FOO YOKE FOON

v.

PUBLIC BANK BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
NH CHAN JCA
SITI NORMA YAAKOB JCA
[CIVIL APPEAL NO: W-02-276-1996]
31 MAY 2000

LAND LAW: *Charge - Order for sale - Different interest rates in letter of offer and charge documents - Interest rate demanded by chargee higher than in letter of offer - Whether constitutes "cause to the contrary"*

This was an appeal from the decision of the High Court granting an order for sale of a charged property against the appellant. The final issue raised by the appellant was whether by claiming a different and higher interest rate from the interest rate of 10% stated in the letter of offer for the banking facilities, the appellant had established sufficient "cause to the contrary" entitling him to resist the order for sale.

Held:
Per Shaik Daud Ismail JCA

[1] The charge documents stipulated interest at 18% per annum. They also provided for variation of interest at the instance of the respondent as well as penalty interest to be imposed. The documents were executed by the appellant in the presence of his own solicitors. Hence, the appellant could not be heard to say that the variation of interest by the respondent was a unilateral act. Written notice to vary interest or to impose penalty interest is not a must.

[2] However, since no notice was given to the appellant, the court could order a readjustment of the interest. In this case, the respondent was only entitled to interest at 18% per annum as stipulated in the charge documents.

[3] The appellant had not established sufficient "cause to the contrary" within s. 256(3) of the National Land Code 1965.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang memerintahkan satu perintah untuk jualan satu hartanah yang dicagarkan oleh perayu. Isu utama yang dibangkitkan oleh perayu adalah samada dengan menuntut kadar faedah yang berbeza dan lebih tinggi dari 10% sebagaimana yang tertera di dalam surat tawaran kemudahan perbankan, perayu telah membuktikan bahawa terdapat "cause to the contrary" yang memberihak kepada beliau untuk menentang perintah untuk jualan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Dokumen gadaian menetapkan faedah pada kadar 18% setahun. Ia juga memperuntukkan yang responden dapat mengubah kadar faedah dan mengenakan faedah penalti. Dokumen tersebut disempurnakan oleh perayu dalam kehadiran peguamnya sendiri. Dari itu, perayu tidak boleh mengatakan bahawa perubahan kadar faedah adalah perbuatan satu pihak responden. Notis bertulis untuk mengubah faedah atau mengenakan faedah penalti bukanlah sesuatu yang wajib.

[2] Oleh kerana tidak ada notis diberikan kepada perayu, mahkamah boleh membuat perintah untuk menyelaraskan semula faedah. Dalam kes ini, responden hanya berhak kepada faedah pada kadar 18% setahun sebagaimana yang diperuntukkan di dalam dokumen gadaian.

[3] Perayu tidak membuktikan bahawa terdapat "cause to the contrary" yang memadai dalam ertikata s. 256(3) Kanun Tanah Negara 1965.

[Rayuan ditolak.]

Legislation referred to:
National Land Code 1965, s. 256(3)

For the appellant - Wong Kam Leong; M/s Wong Kam Leong & Partners
For the respondent - Satish Vasudevan Nair; M/s Gulam & Wong

[Appeal from High Court, Shah Alam; Originating Summons No: 24-3-1995]

Reported by Yow Ting Fong

JUDGMENT

Shaik Daud Ismail JCA:

This was an appeal from the decision of the High Court which had granted an order of sale of a third party charge of property belonging to the appellant which had been charged to the respondent. It is not disputed that the land belonging to the appellant HS(D) 24077, No. PT 23065 Mukim

Kuala Lumpur (the said land) was charged to the respondent as consideration for banking facilities to a company called Bekal Tulin Sdn Bhd of which the appellant was at all material time one of its directors.

On the default of repayment of the banking facilities, the respondent issued an originating summons for an order of sale of the charged property. The appellant thereupon issued a summons-in-chambers for an order that the originating summons be struck out. The learned judge dismissed the application to strike out and, allowed the originating summons and ordered the sale of the property. At the hearing of this appeal learned counsel for the appellant abandoned the appeal against the striking out order but proceeded only on the appeal against the order of sale.

We found that there was only one issue which merited our consideration. It was the contention of the learned counsel for appellant, that the demand was defective in that the respondent had demanded a sum in excess of what was due. It was contended that the letter of offer of the facilities provided for only 10% of interest but the letter of demand asked for 14.5% on the RM1 million overdraft facility and 20% on the excess of RM410,282.04.

We found that while it is true that the letter of offer provided for a 10% interest a perusal of the charge documents showed that the facilities were granted together with interest at 18% per annum. The charge documents also made provisions for variation of interest at the instance of the respondent and they also provided for penalty interest. It is not disputed that the charge documents were executed by the appellant in the presence of his own solicitors. Therefore, he could not be heard to say that the variation of interest by the respondent was a unilateral act.

While we agree with the submission of the counsel for the respondent that cl. 3 the charge documents provides for variation of interest and also for penalty interest to be imposed, under cl. 1(A), it cannot be gainsaid that in order for the respondent to do either or both, written notice must be given to the principal borrower and the chargor. In the present appeal it was submitted and we found it to be so, that the affidavit of the appellant sworn on 27 February 1992 categorically averred at para. 14 that there was no notice of the change of interest, given to him. In the affidavit in reply to this affidavit, the respondent never denied this averment. From this it can be safely inferred that no such notice was given to the appellant. This is fortified by the submission of the learned counsel for the respondent before us that if no notice was given then the court can order a re-adjustment of the interest.

In the present appeal we found that the appellant had not established sufficient 'cause to the contrary' within s. 256(3) of the National Land Code 1965, to warrant us to disturb the finding of the learned judge to refuse the application for sale. We had dismissed the appeal with costs, but in the light of the lack of evidence that the respondent had given notice to the appellant of the variation of the interest, we ordered that the amount due reflect a claim of interest at 18% per annum as provided for by the charge. We also ordered the deposit to go to the account of taxed costs.